



RANDY L. WITHAM

187 IBLA 298

April 15, 2016



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

703-235-3750

703-235-8349 (fax)

RANDY L. WITHAM

IBLA 2016-104

Decided April 15, 2016

Appeal from a Decision Record of the Royal Gorge Field Office, Bureau of Land Management, implementing a permit requirement for recreational mineral collection and other measures to protect public health and safety, water quality, and wildlife in the Cache Creek parcel. DOI-BLM-CO-200-2012-0069-EA.

Decision affirmed; petition for stay denied as moot.

1. Administrative Procedure: Administrative Review--Appeals: Jurisdiction--Federal Land Policy and Management Act of 1976: Land Use Planning--Rules of Practice: Appeals

The Board does not have jurisdiction to review appeals of decisions to approve or amend resource management plans. Under Departmental regulations, land use planning decisions may be protested to the Director of BLM, who issues the final decision of the Department of the Interior.

2. Federal Land Policy and Management Act of 1976: Land Use Planning--Federal Land Policy and Management Act of 1976: Generally--Multiple Use

The essence of the multiple use mandate is simply to require a choice regarding the appropriate balance to strike between competing resource uses, recognizing that not every possible use can take place on any given area of the public lands at any one time. To show error in BLM's multiple use determination, an appellant must demonstrate that BLM's weighing of resource values was unreasonable. General disagreement with the balance BLM strikes is not sufficient to establish that the use of public lands violates FLPMA's multiple use mandate.

3. National Environmental Policy Act of 1969: Generally

BLM need only consider alternatives in an environmental assessment that will accomplish the project's intended purpose, are technically and economically feasible, and will avoid or minimize adverse environmental impacts. NEPA does not require that an agency consider a minimum number of alternatives, and it generally suffices for an agency to consider a no action and proposed action alternative in an environmental assessment, particularly if the proposed action will achieve environmental benefits.

APPEARANCES: Randy L. Witham, Buena Vista, Colorado, *pro se*; Danielle DiMauro, Esq., Office of the Regional Solicitor, United States Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE SOSIN

Randy L. Witham (Appellant) appeals from and petitions for a stay of a February 23, 2016, Decision Record (DR) issued by the Royal Gorge Field Office (Colorado), Bureau of Land Management (BLM). The DR implements a permit requirement for recreational mineral collection (gold panning) in the Cache Creek parcel, closes the parcel to this activity from December 1 to Memorial Day weekend annually, and implements other measures to protect public health and safety, water quality, and wildlife (the Project). BLM analyzed the Project in Environmental Assessment (EA) DOI-BLM-CO-200-2012-0069 EA and its accompanying Finding of No Significant Impact (FONSI). Because Appellant has made no showing that BLM erred in issuing the DR, we affirm BLM's DR and deny Appellant's petition for a stay as moot.

Background

BLM acquired the 2,160 acre Cache Creek parcel, located west of the town of Granite, Colorado, to help protect critical elk and riparian habitat and provide access for recreation. FONSI at 63.¹ The parcel provides a "unique opportunity for people wishing to participate in hobby level placering and as a result has regional if not

¹ The EA, FONSI and DR were published as a single document. The EA comprises pp. 1-62, the FONSI comprises pp. 63-65, and the DR comprises pp. 66-71. The document can be found at http://www.blm.gov/co/st/en/fo/rgfo/minerals/locatable_minerals/cache_creek.html (last visited Apr. 13, 2016).

national significance for this group of people.” *Id.* As explained in the EA, however, the parcel has experienced a “dramatic increase” in recreational mineral collection “over the past 6-7 years” that has “led to issues including user conflicts, impacts to water quality, impacts to riparian areas and concerns with human health and safety.” EA at 11. By approving the Project, BLM seeks to “facilitat[e] the recreation activity through a permit system while putting measures into place to reduce impacts to resources which the parcel was originally purchased to help protect.” FONSI at 63.

The Project requires an Individual Special Recreation Permit for recreational mineral collection, subject to terms and conditions to prevent resource damage and health and safety issues. EA at 11-12; DR at 66. Those terms and conditions include, among other things, limiting digging to a designated area; limiting pumps and pump sizes, dry washers, and wheeled carts; limiting recreational mineral collection to the period from Memorial Day weekend to November 30 annually; prohibiting digging in a manner that causes damage to trees; limiting excavations; imposing a permit fee; and controlling water usage to protect water quality. EA at 12-17; DR at 66.

On March 1, 2016, Appellant filed with BLM and this Board a document entitled “My Protest, Appeal and Request for a Stay to the BLM Environmental Assessment (EA), Cache Creek Placer Area Management Plan, DOI-BLM-CO-200-2012-0069 EA, February 2014, Resigned 23 February 2016.” Although not labeled as such, we treat Appellant’s filing as a combined notice of appeal and statement of reasons in support of appeal, and petition for stay (Appeal) of BLM’s February 23, 2016, DR. BLM filed an opposition to Appellant’s stay petition (Opposition) on March 14, 2016.

Analysis

In his Appeal, Appellant contends that BLM erred in issuing the DR, arguing that the underlying Resource Management Plan (RMP) “institutionalizes [an] unfair negative bias” against “prospectors and prospecting activity;” BLM should have designated the parcel as a Special Recreation Management Area (SRMA); BLM violated the multiple use mandate of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1787 (2012); and BLM violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370h (2012), by failing to consider a reasonable range of alternatives.² We address these arguments below.

² Appellant also takes issue with the fees required to maintain placer mining claims on public lands and the extent of federal public lands in the western states. See Appeal at 5-7. These issues have no bearing on the DR on appeal; accordingly, we will not address them here.

1. *The Board Does Not Have Jurisdiction to Consider Challenges to an RMP.*

Appellant argues that the “ultimate failing of [BLM’s DR] begins with the RMP process itself,” stating that the governing Royal Gorge Resource Area RMP is unfairly biased against prospectors and prospecting. Appeal at 2. In support of this argument, Appellant relies on language from the RMP specifying that “conflicts between fishery habitat and other values . . . will be resolved in favor of fishery habitat” and “conflicts between wildlife habitat and other uses . . . will be resolved in favor of achieving vegetation management goals.” *Id.* at 3 (quoting EA at 8 (quoting the Record of Decision for the Royal Gorge Resource Area Approved RMP at 2-1-4 and 2-1-5)). He also argues that BLM should designate the parcel as an SRMA that would be managed specifically as a “National Gold Prospecting Recreation Area.”³ Appeal at 2; *see also id.* at 5, 8, 9, 15 and 16.

[1] Under FLPMA, BLM, as the designate of the Secretary of the Interior, develops RMPs for the public lands, which guide the agency’s management of those lands. 43 U.S.C. § 1712(a), (e); *see also* 43 C.F.R. § 1601.0-2 (“[RMPs] are designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses.”). It is well-established that, while this Board has authority to review BLM decisions relating to the use and disposition of the public lands, we do not have jurisdiction to review appeals of decisions to approve or amend RMPs. *See* 43 C.F.R. §§ 4.1(b)(2), 4.410(a); *Friends of Living Oregon Waters et al.*, 171 IBLA 271, 277 (2007); *Redding Gun Club*, 171 IBLA 28, 31-32 (2006); *Rainer Huck*, 168 IBLA 365, 396 (2006); *Southern Utah Wilderness Alliance*, 154 IBLA 275, 279 (2001). Rather, under Departmental regulations, land use planning decisions may be protested to the Director of BLM, who issues “the final decision of the Department of the Interior.” 43 C.F.R. § 1610.5-2; *see also Rainer Huck*, 168 IBLA at 396. As the United States Supreme Court explained in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 70 (2004), the Board “does not review the approval of a plan, since it regards a plan as a policy determination, not an implementation decision.”

³ Designation of an SRMA is a planning decision that occurs as part the RMP process. *See* BLM Handbook 8320-1 – Planning for Recreation and Visitor Services (Rel. 8-85 08/22/2014) at I-7. This document is available at http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.36142.File.dat/H-8320-1%20Recreation%20and%20Visitor%20Services%20Planning.pdf (last visited Apr. 13, 2016).

Because we do not have jurisdiction to consider Appellant's arguments concerning the decisions in the Royal Gorge RMP, including Appellant's argument that BLM should designate an SRMA for Cache Creek (which would have to occur through a planning process), we will not address these claims.

2. *BLM's Decision Does Not Violate FLPMA's Multiple Use Mandate.*

Appellant next contends that the Project violates FLPMA's multiple use mandate because prospectors' "present and future needs" are not being met. Appeal at 7-8.

[2] FLPMA directs BLM to manage public lands under the principles of multiple use and sustained yield. 43 U.S.C. § 1701(a)(7) (2012). "Multiple use" is defined, in part, as "the management of public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people" and the "harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment." *Id.* § 1702(c) (2012). We have held that "the essence of the multiple use mandate is simply to require a choice regarding the appropriate balance to strike between competing resource uses, recognizing that not every possible use can take place on any given area of the public lands at any one time." *Bristlecone Alliance*, 179 IBLA 51, 58 (2010) (quoting *Rainer Huck*, 168 IBLA at 400); *see also Forest Guardians*, 168 IBLA 323, 329 (2006) ("The 'multiple-use' mandate in FLPMA requires a choice of the appropriate balance to strike between competing resource uses, recognizing that not every possible use can take place fully on any given area of the public lands at any one time, often necessitating a trade-off between competing uses."); *Friends of the Bow Predator Project*, 139 IBLA 141, 143-44 (1997) ("Multiple use necessitates a trade-off between competing uses . . . [and] does not dictate the choice or require that any one resource, or corresponding use, take precedence.").

"An appellant, complaining BLM failed to adhere to FLPMA's multiple use mandate, has the burden of showing BLM did not engage in a reasoned and informed decision-making process, which demonstrated how the agency balanced competing resource values in order to best meet the present and future needs of the American people." *New Mexico Wilderness Alliance*, 186 IBLA 183, 192-93 (2015) (citing 43 U.S.C. § 1702(c) (2012)). Thus, to show error in BLM's DR, Appellant must demonstrate that BLM's weighing of the resource values was unreasonable; general disagreement with the balance BLM strikes is not sufficient to establish that the use of public lands violates FLPMA's multiple use mandate. *Bristlecone Alliance*, 179 IBLA at 58.

Appellant has not met this standard. The record shows that BLM weighed the competing values in the Cache Creek parcel, including the recreational mining experience as well as wildlife and water quality resources, in order to manage those lands for recreational purposes without the infliction of permanent damage. See, e.g., EA at 6 (explaining that the purpose and need is “to identify an overall management strategy for recreational placer activities” and “reduce impacts to other key resources”); FONSI at 63 (concluding that the Project will “facilitat[e] the recreation activity through a permit system while putting measures into place to reduce impacts to resources which the parcel was originally purchased to help protect”). Appellant offers no evidence that BLM’s weighing of the resource values was in any way unreasonable; he simply disagrees with BLM’s decision, stating that Cache Creek has value as a “national-level mineral resource . . . for the entire recreation gold prospecting community,” that fish “do fine” and that elk frequent the area. Appeal at 9-10. His disagreement with the balance struck by the agency does not, however, establish that BLM’s DR violated FLPMA’s multiple use mandate. *Bristlecone Alliance*, 179 IBLA at 58.

3. *The EA Considered a Reasonable Range of Alternatives in Compliance with NEPA.*

Appellant also claims that BLM violated NEPA by failing to consider a reasonable range of alternatives in the EA analyzing the Project. Appeal at 3-5. In particular, he criticizes BLM for not providing a detailed analysis of an alternative he suggested in which the “entire management of the parcel [would] be focused on recreational placer activities while accepting higher impacts to wildlife and fishery resources.” *Id.* at 4-5 (quoting EA at 21).

[3] NEPA requires that an EA include a brief discussion of appropriate alternatives. See 40 C.F.R. § 1508.9(b); 43 C.F.R. § 46.310(a); *Roseburg Resources Company*, 186 IBLA 325, 336 (2015); *Southern Utah Wilderness Alliance*, 182 IBLA 377, 390 (2012), and cases cited. Appropriate alternatives that BLM need consider are those that “will accomplish the project’s intended purpose, are technically and economically feasible, and will avoid or minimize adverse environmental impacts.” *Roseburg Resources Company*, 186 IBLA at 336 (quoting *Cascadia Wildlands*, 184 IBLA 385, 409 (2014)); *Biodiversity Conservation Alliance*, 183 IBLA 97, 124 (2013). NEPA does not require that an agency consider a minimum number of alternatives, and it generally suffices for an agency to consider a no action and proposed action alternative in an EA, particularly if the proposed action will achieve environmental benefits. *Roseburg Resources Company*, 186 IBLA at 336 (citing *Earth Island Inst. v. United States Forest Serv.*, 697 F.3d 1010, 1022 (9th Cir. 2012)). Our review of an EA’s range of alternatives is guided by a rule of reason. See, e.g., *Cascadia Wildlands*, 184 IBLA at 409; *Southern Utah Wilderness Alliance*, 152 IBLA 216, 223-24 (2000). “[T]he fact

that a party may favor an alternative other than that adopted by BLM does not render the action taken by BLM erroneous.” *Southern Utah Wilderness Alliance*, 152 IBLA at 224.

In this case, BLM considered two action alternatives in detail (in addition to the no action alternative) that would “accomplish the project’s intended purpose” and “avoid or minimize adverse environmental impacts.” *Roseburg Resources Company*, 186 IBLA at 336 (quoting *Cascadia Wildlands*, 184 IBLA at 409); *Biodiversity Conservation Alliance*, 183 IBLA at 124. The first was the proposed action, which puts in place a permitting system and restrictions on recreational mineral collection to protect various resources; the second was a complete closure of the area to recreational mineral collection. EA at 11-21. Under the no action alternative, the area would have remained open to recreational mineral collection with few restrictions. *Id.* at 20. This range of alternatives – from a complete closure of the area to maintaining the status quo – satisfied NEPA’s requirements for an EA, particularly since both action alternatives would “achieve environmental benefits.” *Roseburg Resources Company*, 186 IBLA at 336.

Further, BLM fulfilled its responsibility under NEPA with respect to the alternative suggested by Appellant. BLM explained that while some elements of Appellant’s suggested alternative were to be found in the no action alternative and proposed action, Appellant’s alternative was not analyzed in detail because it would not accomplish the project’s intended purpose “to protect crucial elk and riparian habitat as well as provide recreational opportunities” and would be inconsistent with the RMP’s requirement that BLM strike a “balance between recreation and other resources and specifically that if conflicts occur they will be resolved in favor of wildlife and fisheries habitat.” EA at 21-22. While Appellant characterizes his proposed alternative as being “summarily dismissed” by BLM, Appeal at 5, the EA demonstrates that the agency responded to Appellant’s alternative in detail, both within the EA’s discussion of “Alternatives Considered But Not Analyzed in Detail” as well as in the document’s “Appendix A – Summary of Comments and Responses,” in which BLM provided reasoned explanations for either rejecting or incorporating his suggestions into the alternatives analyzed. See EA at 75-78. Given BLM’s reasoned and thorough responses to Appellant’s proposals, we find no error in the agency’s NEPA compliance. Appellant’s differing opinion on how BLM should manage Cache Creek does not satisfy his burden to demonstrate that the range of alternatives addressed in the EA violated NEPA. *Roseburg Resources Company*, 186 IBLA at 337.

Conclusion

For the reasons discussed above, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we affirm BLM's DR and deny Appellant's petition for a stay as moot.

_____/s/
Amy B. Sosin
Administrative Judge

I concur:

_____/s/
James F. Roberts
Deputy Chief Administrative Judge